Stokely-Van Camp, Inc. *and* **Earl Martin.** Case 25-CA-12292

January 7, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 26, 1981, Administrative Law Judge John H. West issued the attached Decision in this proceeding. Thereafter, counsel for General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and recommendations of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by attempting to discourage its employees from engaging in a strike and other protected concerted activities by withholding payment of accrued vacation pay. In its post-hearing brief to the Administrative Law Judge, the General Counsel also alleges that Respondent violated Section 8(a)(5) of the Act by canceling certain of its employees' scheduled vacations without notice to the Union and without giving the Union an opportunity to bargain over the unilateral change in working conditions. The Administrative Law Judge dismissed the complaint and the General Counsel's additional allegation in their entirety because he found that Respondent's reasons for withholding vacation pay and rescheduling vacations were legitimate and substantial, and that Respondent's actions were not motivated by antiunion considerations. For the reasons set forth below, we find merit in the General Counsel's exceptions and reverse the Administrative Law Judge's Decision.

The collective-bargaining agreements in effect between Respondent and the Union[2] were to expire on June 6, 1980.[3] During a June 4 collective-bargaining session, the Union notified Respondent that a strike would be called at midnight on Friday, June 6, unless new agreements were ratified by that time. Agreement on new contracts was not reached before the expiration of the old contracts and, consequently, a strike commenced at midnight, June 6.[4] Prior to the expiration of the collective-bargaining agreements and following the Union's notice of its intent to strike, Respondent's labor relations manager, James L. Spurgeon, decided, without notifying the Union, to cancel all scheduled employee vacations and withhold payment of vacation benefits.[5] Following the settlement of the strike, all employees were formally notified by Respondent that all vacations previously scheduled for June, July, August, and September had been "voided" and were to be rescheduled before December 29. Accordingly, Respondent's employees took vacation time and received vacation pay under the terms of the new contract.[6] No employee received money in lieu of time off as a result of rescheduling his vacation.

The collective-bargaining agreements between Respondent and the Union provide, *inter alia*, that each employee who has at least 1 anniversary year[7] of continuous service and who has worked at least 150 days within the anniversary year in which vacation time is earned shall accrue vacation time and vacation pay in direct proportion to the number of anniversary years of service with the Company; that employees shall receive vacation pay at the beginning of their vacation period; and that "vacations may, as far as possible, be scheduled for the employees . . . with mutual agreement of the employees and the Company." The contracts also contain management-rights clauses which speak to Respondent's rights to designate production schedules and to direct the work force. The agreements do not provide for pay in lieu of actual vacation. Respondent stated that it is customary for employees to begin their vacations on Monday and that it

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Respondent's business primarily consists of a can manufacturing plant and a food processing plant. The Union is the collective-bargaining representative of the hourly paid production, maintenance, and warehouse employees at each plant. Respondent and the Union are signatories to collective-bargaining agreements at each plant.

[3] All dates herein refer to the year 1980, unless otherwise specifically stated.

[4] The strike ended on August 23 following the ratification of new collective-bargaining agreements.

[5] The General Counsel characterizes Respondent's decision with respect to vacations as a withholding of vacation pay and unilateral cancellation and rescheduling of vacations, while Respondent and the Administrative Law Judge refer to the action merely as a rescheduling of vacations. Despite the differing perceptions of Respondent's actions, it is undisputed that, as a direct result of Respondent's decision, 82 of Respondent's employees did not receive scheduled vacation benefits which had accrued under the terms of the expired collective-bargaining agreements.

[6] As noted by the Administrative Law Judge, the vacation pay eventually received by the employees was greater than that which they would have received under the old contract because a higher wage package was included in the new contract.

[7] The contracts define "anniversary year" as the 12 months following the employee's anniversary date of last hire.

is an established practice for Respondent to pay vacation benefits on the Friday preceding the start of the vacation period.

In dismissing the complaint, the Administrative Law Judge found that Respondent did not unlawfully reschedule its employees' vacations, that it did so in accordance with past practice and the pertinent provisions of the contracts, and that Respondent, therefore, had legitimate business reasons for rescheduling the vacations. Further, the Administrative Law Judge found that the record contains no evidence of union animus or hostility.

Respondent contends that its decision to cancel scheduled vacations and withhold accrued vacation pay was based on business justification; i.e., its past practice and its belief that it had a contractual right to do so.[8] It asserts that, pursuant to those considerations, it reached that decision (1) because it was not contractually required to pay vacation pay in lieu of vacation; (2) because it did not know how many employees would cross the picket line and, if production continued during the strike, Respondent wanted to maximize the number of employees available to work; and (3) to provide periods of rest and relaxation away from work from which it would benefit in terms of increased efficiency, and, therefore, an employee must be working in order to take a vacation. The General Counsel argues that, but for the strike, the employees entitled would have received vacation pay in accordance with the contracts and past practice, and that, under *N.L.R.B* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), Respondent's failure to pay vacation benefits when due was discriminatory and inherently destructive of employees' rights and violative of the Act, even in the absence of independent evidence of unlawful motive. Alternatively, the General Counsel asserts that the employees had satisfied all contractual requirements necessary to accrue and receive vacation benefits, and Respondent's asserted business reasons for canceling benefits were pretextual and motivated by antiunion considerations.

None of the contractual provisions relied on, including the management-rights clauses, clearly or specifically authorizes the conduct in which Respondent engaged. Respondent claims, and the Administrative Law Judge found, that Respondent's past practice during potential and actual strike activity shows a consistent policy based on *its* interpretation of the effective collective-bargaining agreements. Our examination of the evidence, however, fails to support that conclusion.

The pertinent evidence shows that, during a strike in 1974, Respondent's employees were paid their accrued vacation pay although they were required to take vacations following the strike.[9] In the present case, all vacation benefits were canceled for the duration of the strike.[10] In 1977, in response to the Union's threat to strike, Respondent posted a notice stating that in the event of a strike no vacation benefits would be paid and all vacations would be rescheduled, but no strike occurred, and no vacation benefits were withheld or vacations canceled. Here, Respondent canceled vacations and withheld vacation pay from employees prior to the commencement of the strike and before it could be determined that a strike actually was going to take place. The 1974 and 1977 instances encompass Respondent's history of past practice in strike-related situations, and they clearly fail to establish the pattern claimed by Respondent.

Respondent further asserts as a business justification that an employee must be working in order to go on vacation and, because the employees were striking rather than working, it was permissible to cancel their vacations and withhold vacation benefits. This contention, however, is not supported by either its bargaining agreements or its past practice. As noted, the contract is silent in this regard. Moreover, on June 6, before it knew who, if anyone, would participate in the called strike, Respondent canceled vacations and withheld vacation pay from employees who, but for the strike, would have received their vacation benefits well before the start of the strike. In addition, the withholding of such benefits from nonworking employees has not, in fact, been Respondent's practice. The record shows instead that vacation benefits consistently have been provided on a regular basis to employees on leave of absence and sick leave immediately before the start of their scheduled vacations. Thus, Respondent's asserted belief that it had a contractual right to withhold the benefits cannot withstand scrutiny.

It is immaterial, therefore, that Respondent was not contractually required to pay vacation pay in lieu of vacation. Rather, Respondent was not empowered by either the collective-bargaining agreements or past practice to refuse to pay earned vacation benefits.

It is readily apparent that, under the contracts, the employees were entitled to vacation pay and

[8] As set forth in full by the Administrative Law Judge, we specifically note that the contractual management-rights clauses provided, *inter alia*, that the authority vested to the Company "will not be used for the purpose of discrimination against any member of the Union."

[9] It is not clear from the record whether the Union took part in formulating the 1974 arrangement with respect to vacation benefits, or whether Respondent unilaterally decided to pay accrued benefits and rescheduled vacations.

[10] A small number of vacation checks covering vacations scheduled to start on June 9 were erroneously distributed prior to the strike.

that, pursuant to past practice, but for the strike activity, those entitled would have been able to take their vacations and receive vacation pay on request. Accordingly, we find no merit in Respondent's contention that employees cannot be on strike and on vacation at the same time. There is no evidence here that Respondent had a contractual right or other legitimate business justification for dictating how time off from work should be spent.[11] Its desire to maximize the number of employees available for work during the strike does not give it the right to penalize employees for choosing to exercise their Section 7 right to strike.

The Administrative Law Judge found that the evidence fails to establish antiunion motivation. We have found that the reasons advanced by Respondent are not supported by the record. Here, upon learning of the Union's intent to strike, and prior to the start of the strike, Gary Miller, Respondent's plant superintendent, told the Charging Party, Earl Martin, that it was the Union's fault that Martin did not receive the vacation pay to which he was entitled. By placing the onus on the Union for the withholding of vacation benefits, Respondent clearly demonstrated that its actions were taken in retaliation against the Union and to attempt to discourage its employees from engaging in protected concerted activity and striking. In addition, during the strike, Respondent's employee relations manager told an employee that he would not receive his vacation pay because Respondent decided that he could not vacation and strike at the same time.[12]

We find, therefore, contrary to the Administrative Law Judge, that the reasons asserted by Respondent in defense of its actions are pretextual or unlawful, and that Respondent's denial of earned vacations and vacation pay violated Section 8(a)(1) and (3) of the Act.[13] We further find that, by unilaterally changing the terms and conditions of employment respecting vacation pay and vacations, Respondent also violated Section 8(a)(5) of the Act.[14]

[11] Cf. *Borden, Inc., Borden Chemical Division*, 235 NLRB 982 (1978).

[12] In light of Respondent's demonstrated union animus, we find it unnecessary to determine whether or not Respondent would have violated the Act absent proof of antiunion motivation. *N.L.R.B.* v. *Great Dane Trailers, Inc., supra.*

[13] Cf. *Norman Mesnikoff, Receiver in Bankruptcy for Mid-State Broadcasting Co., d/b/a WHLW*, 248 NLRB 1206 (1980).

[14] See, generally, *Wallace Metal Products, Inc.*, 244 NLRB 41 (1979); and *Gulf Envelope Company*, 256 NLRB 320 (1981).

As noted earlier, the alleged violation of Sec. 8(a)(5) was raised for the first time by counsel for the General Counsel in her post-hearing brief to the Administrative Law Judge. Upon a careful review of all the evidence, we are satisfied that the operative facts forming the basis for the violation are well established in the record. Credited testimony of Respondent's labor relations manager, Spurgeon, and employee relations manager, Paulsen, clearly shows that Respondent did not confer with or notify the Union about the cancellation of vacations and withholding of vacation pay. In light of this testimony and because the issue was fully litigated and is closely related to the subject matter of the complaint, we hereby find that Respondent violated Sec. 8(a)(5) by unilaterally canceling employee vacations and withholding and deferring payment of vacation benefits even though such conduct was not alleged to be an unfair labor practice in the complaint. See, generally, *Crown Zellerbach Corporation*, 225 NLRB 911 (1976); and *The Timken Company*, 236 NLRB 757 (1978).

[15] Backpay shall be computed with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

CONCLUSIONS OF LAW

1. Stokely-Van Camp, Inc., is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, Local No. 1473, is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By withholding and deferring payment to its employees of their accrued vacation pay and canceling and rescheduling their earned vacations as specified in the controlling collective-bargaining agreements in effect between Respondent and the Union, Respondent unilaterally changed the wages, hours, working conditions, and terms and conditions of employment of its employees without advance notice and bargaining with the Union, and attempted to interfere with, restrain, or coerce and retaliate against its employees for exercising their rights to engage in union and concerted activities in violation of Section 8(a)(1), (3), and (5) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in, and is engaging in, certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, we shall order Respondent to cease and desist therefrom.

We shall also order Respondent to make the strikers whole for any monetary loss resulting from Respondent's unlawful action.[15] But for Respondent's unfair labor practices, employees whose vacations were scheduled during the strike would have received their vacation pay at that time and then would have worked continuously after the strike, receiving their weekly wages. However, because of Respondent's unlawful conduct these employees were required to take their vacation after the strike, thereby depriving them of work time and accompany wages. Thus, by failing to pay vacation

benefits when payment was due, and by requiring employees to take time off following the strike when they would ordinarily have been working, the employees suffered a monetary loss equal to the amount they should have received at the time their vacation pay was denied them.[16]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Stokely-Van Camp, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local Union No. 1473, United Steelworkers of America, or any other labor organization, by discriminating against its employees by withholding and deferring payment of accrued vacation pay and canceling and rescheduling vacations because they engaged in or were about to engage in protected concerted activity.

(b) Unilaterally canceling scheduled vacations and requiring that all vacations be rescheduled, without notice to or consultation with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole, with interest, all striking employees for any loss of wages and/or vacation pay they may have suffered as a result of Respondent's failure to pay vacation benefits as provided in the effective collective-bargaining agreements. Backpay and interest thereon shall be computed in the manner prescribed in the remedy herein.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Notify and bargain with the aforesaid Union as bargaining representative of its employees in the appropriate bargaining unit regarding any proposed changes in wages, hours, or working conditions of the said employees.

(d) Post at its Indianapolis, Indiana, facility copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[16] See, generally, *Westinghouse Electric Corporation*, 237 NLRB 1209 (1978).

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discriminate against employees in order to discourage membership in Local Union No. 1473, United Steelworkers of America, or any other labor organization, by withholding and deferring payment of accrued vacation pay and canceling and rescheduling vacations because they engaged in or were about to engage in protected concerted activity.

WE WILL NOT unilaterally cancel scheduled vacations and require that all vacations be rescheduled without first giving notice to and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL make whole, with interest, all striking employees for any loss of wages and/or vacation pay they may have suffered as a result of our failure to pay their vacation benefits as provided in the effective collective-bargaining agreements.

WE WILL notify and bargain with the Union regarding any proposed changes in wages, hours, or working conditions of our employees.

STOKELY-VAN CAMP, INC.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge: This case was heard at Indianapolis, Indiana, on February 9, 1981, pursuant to a charge filed on June 12, 1980, and a complaint which was issued on July 18, 1980, as amended on January 30, 1981. The complaint alleges that the Respondent, Stokely-Van Camp, Inc., violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act), in that it withheld from its employee Earl Martin and other of its employees vacation pay in order to discourage employees from engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection and engaging in a strike. A timely answer was filed by Respondent on July 29, 1980.[1]

Upon the record,[2] including the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Indiana corporation, maintains its principal office and place of business, a can manufacturing plant and a food processing plant, at Indianapolis. During the 12-month period ending June 30, 1980, Respondent (1) sold and shipped from its Indianapolis facilities products, goods, and materials valued in excess of $50,000 directly to points outside Indiana, and (2) purchased, transferred, and delivered to its facilities goods and materials valued in excess of $50,000 which were transported to said facilities directly from States other than Indiana.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits, and I find, that the involved Union, United Steelworkers of America, Local No. 1473, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The issue here is whether Respondent unlawfully rescheduled its employees' vacations because of their union activity.[3]

Respondent has had collective-bargaining relations with the Union at the involved plants since at least 1971.[4] As here pertinent, Respondent and the Union had 3-year collective-bargaining agreements for each of the above-described plants, which period ended June 6. The Union notified Respondent, at a negotiation session on June 4, that both plants' employees would be on strike as of midnight June 6. The strike lasted until new contracts were ratified on August 23 and the employees returned to work on August 25. At no time during the strike were any bargaining unit employees doing bargaining unit work for the Company.[5] Certain employees at the processing plant who were scheduled to begin their regular vacations on June 9 received their vacation checks on June 6. Other specified employees at both plants who had company-approved[6] scheduled vacations to begin on

[1] All dates are in 1980 unless indicated otherwise.

[2] Respondent moves to correct p. 181 of the transcript, and, in support of its motion, it submits an affidavit of someone who was present in the hearing room and heard the testimony in question. The affiant's recollection is correct. The motion is granted and it, with the attached affidavit, is received in evidence as Resp. Exh. 13.

[3] The General Counsel, on brief, also contends that the instant case presents another issue; namely, did Respondent, as more fully described *infra*, unilaterally change the working conditions of its employees without giving notice to the Union and an opportunity to bargain over Respondent's conduct.

[4] The Union is the exclusive bargaining representative of the hourly paid production, maintenance, and warehouse employees at the plants.

[5] Supervisory personnel operated the can manufacturing plant during the strike. The plant manager, James Davis, witnessed pickets threatening truckdrivers and damage (hole in the cab and a shattered windshield) inflicted on a truck by a gunblast. He, himself, escorted trucks from the plant until they were outside Indianapolis. As found by the Superior Court of Marion County, Indiana, in *Stokely-Van Camp, Inc.* v. *United Steelworkers of America, AFL-CIO, and Local Union No. 1473, et al.*, Cause No. 5780 0931, a temporary restraining order dated July 23, 1980, numerous acts of violence occurred during the strike and such violence intimidated and prevented employees who desired to continue to work for Respondent from entering Respondent's facilities. (Resp. Exh. 3. See also Resp. Exhs. 4 and 5.)

[6] Approval was given prior to June 4. Respondent's practice is to have employees fill out a vacation request form (i.e., G.C. Exh. 2). Company approval is either indicated on the form or by the Respondent's failure to deny the written request.

various dates from June 9 to August 25 did not receive vacation pay from Respondent during the strike.[7]

The pertinent portions of the agreements are set forth in the appendix hereto. [Omitted from publication.] Briefly, both required Respondent to pay vacation benefits to employees who complied with specified conditions.[8] The agreement which covered the can manufacturing plant contains the following provision:

> Vacations may, as far as possible, be scheduled by employees, upon sixty (60) day advance notice, according to seniority with mutual agreement of the employee and the Company. [Jt. Exh. 2, p. 15, par. 12.13.]

The similar provision in the processing plant agreement reads:

> Vacations may, as far as possible, be scheduled by the employees, according to seniority with the mutual agreement of the employee and the Company. [Jt. Exh. 1, p. 15, par. 12.13.][9]

Regarding past practices, it is noted that during the strike at these plants in 1974, which occurred subsequent to the termination of prior agreements which are said to be basically similar to the involved agreements, Respondent issued vacation checks and required employees to take time off after the strike ended; that in 1977 Respondent posted the following notice in its can manufacturing plant:

> ATTENTION ALL HOURLY EMPLOYEES
>
> Due to the Union's position that the company can no longer hire summer vacation replacements on a temporary employee basis after June 3, 1977, the company will no longer be able to extend to our employees the number of vacations during the summer months as we have in the past. The company regrets having to take this action, but under the circumstances we have no alternative. Any employee affected will be notified by their foreman of the necessity to re-schedule their vacation.[10]

It also posted the following notice in its can manufacturing plant:

> ATTENTION ALL EMPLOYEES
>
> In the event of a work stoppage at Plant #063, there will be no payment of vacation benefits. All employees scheduled to go on vacation while the work stoppage is in effect, must re-schedule their vacation at a later date.
>
> If there is no work stoppage, all employees scheduled to go on vacation on Monday, June 6, 1977 may pick up their vacation checks on Monday, June 6, 1977 after 9:00 AM.[11]

After it was notified by the Union on June 4 of the upcoming strike, Respondent decided to reschedule vacations so that they would be taken after the strike ended. The basis stated at the hearing by Respondent's labor relations manager, James Spurgeon, for his decision was that (1) he believed Respondent had the contractual right to reschedule vacations pursuant to provision 12.13 of both agreements,[12] as described above, and the management-rights clause, which speaks to the direction of the work force and Respondent's right to designate production schedules,[13] (2) he did not know whether all of the employees would honor the strike and, if production continued during the strike, Respondent wanted as many employees available as possible, and (3) he believed that vacations should be taken from work and if employees are on a strike they are not working. Respondent did not notify the Union of its decision prior to implementing it.[14]

About 3 weeks before the involved strike, Larry Martin, then an employee in the processing plant, asked Lester Paulsen, the employee relations manager at that facility, what would happen to his pay for his vacation which was to begin June 16 if there was a strike. Paulsen stated that Respondent would "probably mail it to you like before, but that's all I can tell you right now." Larry Martin understood "like before" to refer to the 1974 strike.

On Friday, June 6, Earl Martin, then an employee in the can manufacturing plant, received his paycheck at

[7] Involved are approximately 17 processing plant employees and 65 can plant employees.

[8] Essentially, benefits accrued under both agreements to those unit members who had been employed for a full year or more and who worked a minimum of 150 days within the anniversary year in which the vacation was earned.

[9] Both agreements also state "[e]mployees entitled to vacation shall receive their vacation pay at the beginning of their vacation period," and "[v]acation pay is based on the straight time hourly day rate in effect on the date vacation is taken" (Jt. Exhs. 1 and 2, p. 15 in both agreements, at pars. 12.14 and 12.15, respectively). Normally employees receive their regular vacation check on the payday before their vacation begins.

[10] Resp. Exh. 11. The notice was dated May 26, 1977, and was signed by Howard E. Winters, plant manager.

[11] Resp. Exh. 2. This notice was also signed by Howard E. Winters. Reference is also made by Respondent to certain of its conduct at another of its Indiana facilities in 1978 and 1979 at which it had a collective-bargaining agreement with the Union involved herein. The agreement is said to have been substantially similar to those involved herein. Respondent rescheduled for after a strike employee vacations which had been scheduled during the strike. The agreement itself was never introduced herein.

[12] Specific instances of Respondent rescheduling previously approved individual vacations were cited by Respondent; i.e., Resp. Exhs. 7 and 12. These reschedulings were based on Respondent's production needs.

[13] Art. V—Management Rights, in both of the involved agreements (Jt. Exhs. 2 and 3), reads as follows:

> The management of the Plant and the direction of the working forces, including the right to hire, suspend or discharge for just cause, or transfer, enlarge or combine, divide, decrease, or rearrange departments, and the right to relieve employees from duty because of lack of work or other legitimate reasons, designate the type of product to be manufactured, where it will be manufactured, production schedules and methods, processes and means of manufacturing are vested exclusively in the Company, provided this will not be used for purpose of discrimination against any member of the Union or be contrary to any other provision of this agreement.

[14] In answering a union inquiry made after Respondent refused to give out regular vacation paychecks on June 6, Spurgeon advised the Union that employees were not going to lose their vacations but would have them rescheduled when the strike ended. Spurgeon told the union representative that he did not believe that Respondent could "schedule somebody for vacation, from time off work when they're not working." The union representative did not demand on behalf of the Union that Respondent give vacation pay to the strikers.

the beginning of the day shift. He did not, however, receive a check for his regular vacation which had been approved (G. C. Exh. 2) and which was supposed to begin on Monday, June 9. In the company of a union representative, Joe Eddington, Earl Martin spoke with the plant superintendent, Gary Miller. Earl Martin pointed out that he was supposed to go on vacation on Monday, and that he had earned the vacation and was entitled to it. Miller agreed. But he said that the employees could not be on a work stoppage and a vacation at the same time, and that it was the Union's fault because during the negotiations they had expressed the desire to go out on strike if the contract was not settled by midnight June 6. Eddington then stated, "Earl, they're not going to give you any more money than they have to to support the strike."[15]

Another employee of the processing plant, Elmer Cox, scheduled a vacation to begin June 16. On Friday, June 13, he picked up his paycheck inside the gate at Respondent's facilities. He asked Paulsen at that time why he did not receive his vacation check. Paulsen responded that vacation checks had all been canceled because Respondent decided that employees could not be on a vacation and on a strike at the same time.

After the 1980 strike ended, employees took time off with pay. Their regular vacation scale was set by the new collective-bargaining agreement. No employee received money in lieu of time off as a result of the rescheduling of these vacations. In fact Respondent points out that in the administration of the involved collective-bargaining agreements employees are not permitted to take vacation pay in lieu of vacation. The following notice was posted in the can manufacturing plant:

ATTENTION ALL EMPLOYEES

All employees with Vacations scheduled in JUNE, JULY, AUGUST or SEPTEMBER, 1980—have been voided. All employees who had a Vacation scheduled during this period, *MUST* reschedule that Vacation, *NO LATER THAN September 5, 1980.*

Employees who began a new anniversary year during June, July, August and September, 1980 and with Vacation time to take from their previous year, *must* start their Vacation no later than December 29, 1980.

Employees with Vacations to schedule from their previous anniversary year will be given priority in rescheduling their vacations, in-so-far as is possible.[16]

III. CONTENTIONS

The General Counsel, citing *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), contends that Respondent's conduct is "inherently destructive" of employees' rights and, therefore, no independent proof of illegal motive is required and no proof of business justification is adequate to defend the violation. It is asserted by the General Counsel that, even if the conduct is not "inherently destructive," Respondent failed to prove a legitimate and substantial business justification since those given by Spurgeon are pretextual in that (1) allegedly, neither the agreements nor any past practice developed at either plant permits Respondent to reschedule, at its will, a group of employees' vacations, (2) the management-rights clause was inapplicable since no bargaining unit employees did unit work during the strike,[17] and (3) Respondent's alleged policy of requiring employees to be working at the time they begin their vacations has exceptions, as admitted by Spurgeon; i.e., employees have been on leave of absence or sick immediately before their vacations, and this does not itself explain why those can plant employees whose vacations were to commence on Monday, June 9, did not receive their vacation paychecks. Moreover, the General Counsel contends that even if these reasons were relied on in good faith, they were insufficient justification, and, even if that is not the case, the challenged conduct still violated the Act because credible evidence shows that Respondent possessed an illegal motive. Consequently, reasons based on contract and past practice are, according to General Counsel, irrelevant.

As indicated above, it is the General Counsel's position that by canceling the vacations of a group of employees without giving the Union notice and an opportunity to bargain over the change in working conditions Respondent unilaterally changed the working conditions of its employees in violation of Section 8(a)(5) of the Act. The General Counsel argues that the violation should be found and remedied even though not specifically alleged in the complaint since assertedly this issue was fully litigated at the hearing and it is intimately related to the subject matter of the complaint.

Respondent argues that rescheduling of vacations is not "inherently destructive" of important employee rights because (1) rescheduling by Respondent is authorized by the contracts[18] and past practices and, therefore, did not represent any diminution of vacation benefits, and (2) rescheduling *vis-a-vis* a denial of vacation benefits can be unlawful only if an antiunion motivation for the action is established.[19] Assertedly, Respondent had a sub-

[15] The vacation checks which would have been given out on June 6 were in the can manufacturing plant but pursuant to Spurgeon's order to reschedule all vacations they were not given to the employees. As indicated above, apparently because of a misunderstanding those regular vacation checks which were in the processing plant on June 6 were given out (with the exceptions noted in the G.C. Exh. 3).

[16] G.C. Exh. 4. The notice was dated August 28, 1980, and signed by James G. Davis, plant manager.

[17] It is argued that this reason is pretextual; that if Respondent had been acting in good faith, without illegal motivation, then it would have issued the vacation checks when it became apparent that everyone was supporting the strike, or even at the end of the strike.

[18] Respondent points out that during the 1980 negotiations the Union proposed that the 60-day scheduling provision be amended to make the scheduling irrevocable inside the 60 days prior to the beginning of the employee's vacation. Assertedly, the Union, by attempting to obtain irrevocable scheduling of vacations, admitted that Respondent had the right under the preceding contract to reschedule vacations. Resp. Exh. 13.

[19] It is pointed out by Respondent that the vacation pay eventually received by the employees when their vacations were rescheduled was greater than they would have received at the time their vacations were originally scheduled.

stantial legitimate business justification for rescheduling vacations. It took the same action during prior actual and threatened strike situations involving the Union, which Respondent contends demonstrates that it had the consistent policy based on its interpretation of the involved agreements. Production needs had resulted in rescheduling of individual vacations in the past. And, Respondent continued production at the can manufacturing plant using supervisory personnel and had work available for unit members throughout the strike. Finally, Respondent believes "that the strike made it inappropriate for employees to go on vacation since they were not working from which to take a vacation."[20] It is argued by Respondent that there is no evidence of any antiunion motivation. The statement made by Eddington, the union official, as to Respondent's motivation is assertedly not competent evidence of Respondent's actual motivation.

While Respondent argues that there is no basis for finding that it committed an unfair labor practice, it points out that, even if this is not the case, an award of backpay would be improper because there is no evidence of any damage. Assertedly, any backpay award would constitute a windfall for the employees who fortuitously scheduled vacations during the strike.[21]

IV. DISCUSSIONS AND CONCLUSIONS

For the reasons set forth below, I do not believe that the involved conduct warrants a finding that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

Under the former, it is an unfair labor practice for an employee "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 7 of the Act." Section 7 guarantees employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Under Section 8(a)(3), it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."[22] *N.L.R.B.* v. *Great Dane Trailers, supra*, cited by the General Counsel is factually distinguishable because there, unlike here, the respondent refused to pay striking employees vacation benefits accrued under a terminated collective-bargaining agreement while it announced an intention to pay such benefits to striker replacements, returning strikers, and nonstrikers who had been at work on a certain date during the strike. As pointed out by the court in *N.L.R.B.* v. *Borden, Inc., Borden Chemical Division*, 600 F.2d 313, 320 (1st Cir. 1979), however, unequal treatment of different classes of employees is not a prerequisite to finding an 8(a)(3) violation where employees are discriminated against because they engaged in a concerted activity. But were the involved employees discriminated against because they engaged in a strike?

Involved herein is the scheduling of vacations. There is no provision in either of the pertinent agreements for money to be paid in lieu of actual vacation. And Respondent points out that in the administration of the involved agreements employees are not permitted to take vacation pay in lieu of vacations; to receive vacation pay employees must take time off from work for vacations.[23] The issue, therefore, is the scheduling of vacations and not merely the payment of accrued vacation pay. *Texaco, Inc.*, 179 NLRB 989 (1969).

Respondent's practice under pertinent agreements with the Union was to reschedule vacations as necessary even after Respondent had given its approval. It appears that Respondent has not taken anything away from those employees who scheduled vacations to begin during the strike but merely required them to postpone their vacation. *The Detroit Edison Company*, 206 NLRB 898 (1973).[24]

In 1974 employees were given vacation pay during the strike but had to take time off after the strike. On the other hand, in 1980, employees, with the exceptions noted *supra*, did not receive vacation pay until they took their vacations, which is in accord with paragraph 12.14 of the involved agreements. When the employees did receive their vacation pay, it was set by the new collective-bargaining agreement and was greater than under the old agreement.

Respondent had legitimate business reasons on June 4 when it decided to reschedule vacations. The General Counsel's argument that the management-rights clause was inapplicable since no bargaining unit employees did unit work during the strike overlooks the fact that when the decision was made on June 4 to reschedule vacations Respondent could not have been aware of this. If subsequent events are to be taken into consideration, included must be the violent nature of the strike and its effect on (1) employees who may have wanted to continue to work, and (2) anyone in management who would contemplate reversing a legitimate determination. The exceptions to Respondent's policy that employees must be working in order to go on vacation prove, rather than disprove, the legitimacy of the rule. The policy is applied generally but exceptions are made when justified in individual circumstances.

[20] It is conceded that there are exceptions to this rule, i.e., employees on sick leave or leave of absence have been allowed to take their vacation at times when they would otherwise be working, but it is submitted that these exceptions were for the purpose of accommodating employees who were in difficult personal situations.

[21] By not paying vacation pay for vacations which were scheduled during the strike, Respondent contends, it caused all strikers to be treated equally in regard to payment of wages. As pointed out in Respondent's brief, perfect equality was not achieved in that the 19 employees who received vacation paychecks on June 6 and those employees whose vacation began before June 6 and continued into the strike were not required to take vacations without pay after the strike.

[22] The Supreme Court in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 233 (1963), held that discouraging participation in legitimate strikes is included in this section of the Act.

[23] As indicated in fn. 21, *supra*, there were some exceptions to this practice during the 1980 strike. These exceptions, however, appear to be an aberration and had nothing to do with whether these individuals did or did not participate in the strike.

[24] Compare this to the situation in *Westinghouse Electric Corporation*, 237 NLRB 1209 (1978), where the respondent therein denied vacation pay to strikers during a period when the plant was shut down but gave a week's vacation pay to nonstrikers. The strikers were given time off with pay at a later date but in effect were denied a week of work by the respondent because they refused to abandon the strike. This is not the situation at hand.

Antiunion motivation has not been demonstrated. The statements made by Paulsen and Miller do not suggest union animus or hostility. And Union Representative Eddington's statement was not adopted by Respondent.

The General Counsel's charge that Respondent unilaterally changed the working conditions of its employees in violation of the Act is not supported by the record. Respondent did not change the working conditions. As indicated above, Respondent's conduct was in accord with past practice.

I find that Respondent's reasons for rescheduling are legitimate and substantial and are not pretextual since no antiunion motivation has been demonstrated.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act, and engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

3. As found above, Respondent has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]